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1-7-2019

# A Piece of Cake or Religious Expression: Masterpiece Cakeshop and the First Amendment

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January 7, 2019

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and the First Amendment**

*Richard F. Duncan\**

**Recommended Citation:**

Richard F. Duncan, *A Piece of Cake or Religious Expression: Masterpiece Cakeshop and the First Amendment*, NEB. L. REV. BULL. (Jan. 7, 2019), <https://lawreview.unl.edu/piece-cake-or-religious-expression-masterpiece-cakeshop-and-first-amendment>.

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## I. INTRODUCTION

Sadly, religious liberty has become a matter of great controversy and division in our society. Although not so many years ago there was a nearly unanimous, bi-partisan consensus supporting the legal protection of religious liberty from laws substantially burdening the free exercise of religion,<sup>1</sup> irreconcilable differences among us over contraception, abortion, sexuality, and the nature of marriage have made religious liberty a divisive partisan issue.<sup>2</sup> Although most religious liberty cases concern religious minorities whose religiously-motivated conduct has been disregarded “by an insensitive majority,”<sup>3</sup> a handful of cases involving Christian-owned businesses and ministries claiming a religious liberty right to refuse to supply contraceptives and abortifacients to their students and employees or goods and services for same-sex marriages have led progressives to turn their backs on religious liberty.<sup>4</sup> As Professor Laycock puts it, progressives “persist in demanding not only the right to live their own lives by their own values, but also the right to force religious objectors to assist them in doing so.”<sup>5</sup> As a result, “[r]eligious liberty is at risk”<sup>6</sup> wherever progressive elites are in power.

Onto this desolate stage strode Jack Phillips, a wedding cake artist who deeply and reasonably believes “that ‘God’s intention for marriage from the beginning of history is that it is and should be the union of one man and one woman.’”<sup>7</sup> Phillips considers his wedding cakes artistic expression celebrating the beauty of marriage as God designed marriage.<sup>8</sup> Each one of his wedding cakes is custom made. As Phillips’s attorneys explain:

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<sup>1</sup> As Professor Douglas Laycock observes, “When Congress passed the federal RFRA in 1993, it acted unanimously in the House and 97–3 in the Senate.” Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 845. However, in a matter of only a few years, Congress went from nearly unanimous support for religious liberty “to partisan gridlock.” *Id.* at 846.

<sup>2</sup> *Id.*

<sup>3</sup> Luke W. Goodrich & Rachel N. Busick, *Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases*, 48 SETON HALL L. REV. 353, 354, 400 (2018).

<sup>4</sup> See Laycock, *supra* note 1, at 846.

<sup>5</sup> *Id.* at 879–880.

<sup>6</sup> *Id.* at 880.

<sup>7</sup> *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1724 (2018).

<sup>8</sup> See Brief for Petitioner at 9, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111) [hereinafter “Petitioner’s Brief”].

Much like an artist sketching on canvas or a sculptor using clay, Phillips meticulously crafts each wedding cake through hours of sketching, sculpting, and hand-painting. The cake, which serves as the iconic centerpiece of the marriage celebration, announces through Phillips's voice that a marriage has occurred and should be celebrated.<sup>9</sup>

Although Phillips is happy to serve all people without regard to race, religion, or sexual orientation,<sup>10</sup> “he cannot design custom cakes that express ideas or celebrate events at odds with his religious beliefs.”<sup>11</sup> Thus, Phillips will not design cakes celebrating Halloween or divorce, or those promoting hateful messages aimed at racial minorities or gays and lesbians.<sup>12</sup>

In July 2012, Charlie Craig and David Mullins, a same-sex couple, visited Phillips's bakery, Masterpiece Cakeshop, and “requested that Phillips design and create a cake to celebrate their same-sex wedding.”<sup>13</sup> Phillips informed the couple that based upon his sincerely held religious beliefs, he does not create custom wedding cakes celebrating same-sex marriages, but he also told them that “he would be happy to make and sell them any other baked goods.”<sup>14</sup> In other words, Phillips was happy to serve LGBT customers in general, but he believed it would “displease God” if he were to create wedding cakes for same-sex marriages.<sup>15</sup>

Although the same-sex couple was easily able to find another baker to create and bake a multi-tiered, rainbow-layered wedding cake—in fact, the other baker did not even charge the gay couple for the cake<sup>16</sup>—they filed a sexual orientation discrimination complaint against Phillips under Colorado's public accommodations law. The Colorado Civil Rights Commission ruled

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<sup>9</sup> *Id.* at 1–2.

<sup>10</sup> *Id.* at 8–9.

<sup>11</sup> *Id.* at 9.

<sup>12</sup> *Id.*

<sup>13</sup> *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 276 (Colo. App. 2015), *rev'd*, 138 S. Ct. 1719 (2018). Notice that the record in this case makes clear that Craig and Mullins requested a cake “celebrating” their marriage, one which was designed to recognize that their relationship was a marriage and was something to be celebrated. *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 277 (“Phillips believes that decorating cakes is a form of art, that he can honor God through his artistic talents, and that he would displease God by creating cakes for same-sex marriages.”).

<sup>16</sup> Petitioner's Brief, *supra* note 8, at 10.

that Phillips was guilty of sexual orientation discrimination and issued an order requiring Phillips to “cease and desist from discriminating against . . . same-sex couples by refusing to sell them wedding cakes or any product [he] would sell to heterosexual couples.”<sup>17</sup> In other words, the order mandated that Phillips must create custom wedding cakes celebrating same-sex marriages if he creates cakes celebrating traditional marriages between one man and one woman.<sup>18</sup> In effect, if he creates art he wishes to create, he is compelled to create art he does not wish to create. At Supreme Court oral argument in this case, Justice Ginsburg asked the gay couple’s lawyer, David Cole, what would happen if Phillips would design a wedding cake “that said: God bless the union of Ruth and Marty.” Cole replied: “[T]hen he would have to say God bless the union of Dave and Craig” because otherwise it would constitute discrimination on the basis of sexual orientation.<sup>19</sup> Thus, the Commission’s order was so broad as to require Phillips to include religious blessings on cakes celebrating same-sex marriages.

After the Colorado Court of Appeals rejected Phillips’s First Amendment claims under the Free Speech and Free Exercise Clauses,<sup>20</sup> the Supreme Court of the United States granted his petition for certiorari<sup>21</sup> and held that the Commission’s actions “violated the Free Exercise Clause[] and its order must be set aside.”<sup>22</sup> The purpose of this Article is to measure the impact of the Court’s decision on religious liberty and compelled speech claims going forward. Although the Court did not decide Phillips’s free speech claim in *Masterpiece Cakeshop*,<sup>23</sup> the majority opinion<sup>24</sup> and the concurring opinions contain a great deal of grist for the mill.<sup>25</sup> Moreover, the Court’s landmark compelled speech decision in *National Institute of Family & Life Advocates v. Becerra*<sup>26</sup> in June 2018 seems to strongly support a future freedom of speech claim involving a wedding cake artist or other expressive vendor

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<sup>17</sup> *Masterpiece Cakeshop*, 138 S. Ct. at 1726 (citation omitted).

<sup>18</sup> *Id.*

<sup>19</sup> Transcript of Oral Argument at 76, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111).

<sup>20</sup> *Masterpiece Cakeshop, Inc.*, 370 P.3d 272.

<sup>21</sup> 85 U.S.L.W. 3593 (June 26, 2017) (No. 16-111).

<sup>22</sup> *Masterpiece Cakeshop*, 138 S. Ct. at 1724.

<sup>23</sup> *Id.* at 1723–24.

<sup>24</sup> *Id.* at 1723–32.

<sup>25</sup> *See id.* at 1740–48 (Thomas, J., concurring).

<sup>26</sup> 138 S. Ct. 2361 (2018).

compelled by law to create art or expression contrary to his or her conscience.

This Article will explain and analyze the Court's First Amendment jurisprudence in *Masterpiece Cakeshop*. First, I will focus on the free speech issue in the case and the Court's decision to avoid reaching the merits of that claim. Next, I will focus on the free exercise holding in the case with the goal of locating that holding within the Court's pre-existing Free Exercise Clause jurisprudence. Finally, I will suggest that *Masterpiece Cakeshop* is perhaps the first step in a future restoration of constitutionally-protected religious liberty.

## II. THE COMPELLED SPEECH ISSUE IN *MASTERPIECE CAKESHOP*

The Supreme Court has repeatedly held that the right of free speech includes the right not to be compelled to speak.<sup>27</sup> Alexander Solzhenitsyn has captured the essence of the right not to speak as being based upon each individual's conscience and commitment to the truth as he or she understands it. In an essay titled *Live Not By Lies*,<sup>28</sup> Solzhenitsyn said, "let us refuse to say that which we do not think," and went on to explain that an honest man worthy of the respect of both his children and his contemporaries "[w]ill not depict, foster or broadcast a single idea which he can only see is false or a distortion of the truth whether it be in painting, sculpture, photography, technical science, or music."<sup>29</sup> It is difficult to imagine any deprivation of liberty greater than being compelled by government to express an idea you believe to be not only untrue, but untrue to your understanding of God's version of the truth.

The Supreme Court has made clear that government may neither "compel the dissemination of its own preferred message . . . [n]or may it compel one private speaker to disseminate the message

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<sup>27</sup> See *infra* notes 31–43 and accompanying text.

<sup>28</sup> Alexander Solzhenitsyn, *Live Not By Lies* (1974), in *ORTHODOXY TODAY*, <http://www.orthodoxytoday.org/articles/SolzhenitsynLies.php> (last visited Jan. 2, 2019).

<sup>29</sup> *Id.* ("Solzhenitsyn penned this essay in 1974 and it circulated among Moscow's intellectuals at the time. It is dated Feb. 12, the same day that secret police broke into his apartment and arrested him. The next day he was exiled to West Germany. The essay is a call to moral courage and serves as light to all who value truth.").

of another private speaker.”<sup>30</sup> The landmark case recognizing the “no compelled speech” doctrine is *West Virginia State Board of Education v. Barnette*,<sup>31</sup> the case in which the Court struck down mandatory flag salutes in public schools and explained its ruling in these unforgettable words of Justice Jackson:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.<sup>32</sup>

Although it was once possible to read *Barnette* as only prohibiting government from compelling affirmations of belief, such as the Pledge of Allegiance, it soon became clear that the compelled speech doctrine also forbids government from compelling the dissemination of unwanted expression. Consider, for example, *Wooley v. Maynard*,<sup>33</sup> the famous case concerning the license plate motto “Live Free or Die,” in the state of New Hampshire. Mr. Maynard, a Jehovah’s Witness who was conscientiously opposed to displaying that motto, covered it with

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<sup>30</sup> Brief for United States as Amici Curiae Supporting Petitioners at 10, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111) (citing *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1 (1986); *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974)).

<sup>31</sup> 319 U.S. 624 (1943).

<sup>32</sup> *Id.* at 642. Justice Jackson further justified this decision protecting freedom of thought and expression from compelled unity of expression in these eloquent words:

As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

*Id.* at 641.

<sup>33</sup> 430 U.S. 705 (1977).



tape on his license plate.<sup>34</sup> The state of New Hampshire, somehow missing the irony of its actions, repeatedly prosecuted Maynard for covering up its libertarian credo.<sup>35</sup> The Supreme Court of the United States held that New Hampshire may not require drivers in the state to display the state motto and announced the “no compelled speech” rule in clear and unqualified language. “We begin,” said the *Wooley* Court, “with the proposition that the right of freedom of thought protected by the First Amendment . . . includes both the right to speak freely and the right to refrain from speaking at all.”<sup>36</sup> In other words, the government may neither silence those who wish to speak, nor put words in the mouths of those who wish not to speak.<sup>37</sup> A state’s interest in dissemination of its values does not “outweigh an individual’s First Amendment right to avoid becoming the courier for such message.”<sup>38</sup>

The Supreme Court has also made clear that the compelled speech doctrine extends to the right of one private individual to refuse to foster or convey the ideas or expression of another private individual, even when the issue arises in the context of a public accommodations law. In *Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston, Inc.*,<sup>39</sup> a case involving a sexual orientation discrimination complaint under a public accommodations law in the context of the Boston St. Patrick’s Day parade, the parade organizer was ordered by the state court to allow GLIB, a gay and lesbian group, “to march in the parade as a way to express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals.”<sup>40</sup> Justice Souter, writing for a unanimous Court, held that the state court order violated the First Amendment and compared the idea of speaker autonomy—the right of the speaker to shape her “expression by speaking on one subject while remaining silent on another”—to that of a composer of a musical

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<sup>34</sup> Mr. Maynard testified that the motto was contrary to his religious belief that, as a member of Jehovah’s Kingdom, he was the recipient of “everlasting life.” *Id.* at 707 n.2. It also violated his political belief “that life is more precious than freedom.” *Id.*

<sup>35</sup> New Hampshire law makes it a misdemeanor to cover or obscure the numbers or letters on a license plate. *Id.* at 707. Maynard was charged and convicted thrice, served fifteen days in jail, and finally sued for an injunction against further enforcement of the law. *Id.* at 708–09.

<sup>36</sup> *Id.* at 714.

<sup>37</sup> Chief Justice Burger’s majority opinion further explained that “[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind.’” *Id.* (citation omitted).

<sup>38</sup> *Id.* at 717.

<sup>39</sup> 515 U.S. 557 (1995).

<sup>40</sup> *Id.* at 561.

score who selects which notes to include and which to exclude.<sup>41</sup> Although state law had classified the parade as a place of public accommodation, the Court held that the Free Speech Clause applied because “once the expressive character of both the parade and the marching GLIB contingent is understood, it becomes apparent that the state court’s application of the statute had the effect of declaring the sponsors’ speech itself to be the public accommodation.”<sup>42</sup> Thus, ruled the Court in *Hurley*, the right of a speaker to decide what to say and what not to say lies “beyond the government’s power to control.”<sup>43</sup>

In *Obergefell v. Hodges*,<sup>44</sup> the case in which the Supreme Court created a constitutional right to same-sex marriage, Justice Kennedy’s majority opinion contained powerful dictum designed to reassure people of faith that their views about marriage were not viewed by the Court as either unworthy or unacceptable: “Many who deem same-sex marriage to be wrong” said Justice Kennedy in *Obergefell*, “reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here.”<sup>45</sup> In even further reassuring dictum, the *Obergefell* Court explicitly stated that “[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths.”<sup>46</sup> Thus, unlike racist opposition to interracial marriage, which is indecent and dishonorable, the *Obergefell* majority took great pains to characterize religious opposition to same-sex marriage as decent and honorable.<sup>47</sup>

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<sup>41</sup> *Id.* at 574. Justice Souter concluded that by compelling the parade organizer to permit GLIB to march in the parade, the State violated “the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.” *Id.* at 573.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 575. For a decision protecting a for-profit corporation from being compelled to disseminate the message of other speakers, see *Pacific Gas & Electric Company v. Public Utilities Commission*, 475 U.S. 1 (1986) (concluding a law requiring the appellant to distribute another person’s message in the “extra space” in its billing envelopes violates First Amendment).

<sup>44</sup> 135 S. Ct. 2584 (2015).

<sup>45</sup> *Id.* at 2602.

<sup>46</sup> *Id.* at 2607.

<sup>47</sup> See Ryan T. Anderson, *Disagreement is Not Always Discrimination: On Masterpiece Cakeshop and the Analogy to Interracial Marriage*, 16 GEO. J.L. & PUB. POL’Y 123 (2018) (arguing that support for marriage as a conjugal union of husband and wife is essentially different from racist opposition to interracial marriage).

Now, in *Masterpiece Cakeshop*, Jack Phillips presented Justice Kennedy and the Court with an opportunity to live up to that promise of respect and tolerance for his sincerely held religious beliefs about marriage. Since the law protecting speakers and artists from compelled speech was both clear and strong, the only obstacle in Phillips’s path was to convince the Court that his custom wedding cakes qualify as artistic expression. In other words, are his custom wedding cakes more like barbeque pork served by a restaurant<sup>48</sup> or like a painting or sculpture created by an artist?<sup>49</sup> One of the amicus briefs opposing Phillips in this case, written by First Amendment scholars who normally come out on the side of free speech, candidly admits that the government may not compel persons who create speech or artistic expression, such as painters, photographers, videographers, graphic designers, printers and singers, “to record, celebrate, or promote events they disapprove of, including same-sex weddings.”<sup>50</sup> But somehow this brief concludes that free speech protection does not extend to wedding cake artists, such as Phillips. Cake is food—not speech—it argues.<sup>51</sup>

Surely, a pizzeria cannot claim its pizzas or breadsticks involve First Amendment expression. A wedding vendor who rents chairs, tables and tablecloths is not engaging in an expressive enterprise. So much depends on the facts. At oral argument in *Masterpiece Cakeshop*, Solicitor General Francisco argued that Jack Phillips’s custom cakes “are essentially synonymous with a traditional sculpture except for the medium used.”<sup>52</sup> In other words, Phillips is a sculptor who creates art from cake dough rather than clay or marble. He also paints using cake as his canvas. The Solicitor General suggested that a workable test with respect to a service that is part-art and part-utilitarian is to ask whether it is “predominantly

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<sup>48</sup> For example, at oral argument Justice Breyer suggested that maybe the owner of a barbeque restaurant might believe “he had special barbeque” that should be protected as free speech. Transcript of Oral Argument, *supra* note 19, at 18.

<sup>49</sup> For example, the Court has unanimously concluded that the First Amendment “unquestionably” protects the abstract paintings of artists such as Jackson Pollack even though they do not convey a readily “articulable message.” *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Bos., Inc.*, 515 U.S. 557, 569 (1995).

<sup>50</sup> Brief for Am. Unity Fund, et al. as Amici Curiae Supporting Respondents at 4, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111).

<sup>51</sup> *Id.* at 5 (“A chef, however brilliant, cannot claim a Free Speech Clause right not to serve certain people at his restaurant, even if his dishes look stunning. The same is true for bakers, even ones who create beautiful cakes for use at weddings.”). This brief does concede, at least, that even cakes are protected as speech when they include “written or graphic messages.” *Id.* at 10.

<sup>52</sup> Transcript of Oral Argument, *supra* note 19, at 40.

art or predominantly utilitarian.”<sup>53</sup> In other words, do people pay very high prices for “these highly sculpted” wedding cakes because they taste good and have nutritional value, or “because of their artistic qualities?”<sup>54</sup>

As Phillips’s lawyers argued, his “wedding cakes are his artistic expression because he intends to, and does in fact, communicate through them.”<sup>55</sup> His custom wedding cakes serve as the “iconic” centerpiece of wedding celebrations, and even those cakes that do not contain words clearly express that a wedding has occurred, that the couple’s union is a “marriage,” and that the marriage is a matter for celebration.<sup>56</sup> Indeed, as the Colorado Court of Appeals described the facts in this case, when the same-sex couple entered his shop, they “requested that Phillips design and create a cake to *celebrate their same-sex wedding*.”<sup>57</sup>

Although the majority opinion in *Masterpiece Cakeshop* did not base its holding on the Free Speech Clause,<sup>58</sup> it nevertheless contains some powerful dicta in support of Phillips’s right not to be compelled to create custom cakes with messages that offend his conscience. Speaking for the Court, Justice Kennedy observed that although the free speech issue in this case “is difficult, for few persons who have seen a beautiful wedding cake might have thought of its creation as an exercise of protected speech,” Phillips’s claim “is an instructive example, however, of the proposition that the application of constitutional freedoms in new contexts can deepen

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<sup>53</sup> *Id.*

<sup>54</sup> *Id. See, e.g.,* *Mastrovincenzo v. City of N.Y.*, 435 F.3d 78, 95 (2d Cir. 2006) (When a created item has both an expressive element and some non-expressive utilitarian purpose, “a court should then determine whether that non-expressive purpose is dominant or not.”).

<sup>55</sup> Petitioner’s Brief, *supra* note 8, at 19.

<sup>56</sup> *Id.* The argument continued:

Phillips is as shielded by the Free Speech Clause as a modern painter or sculptor, and his greatest masterpieces—his custom wedding cakes—are just as worthy of constitutional protection as an abstract painting like Piet Mondrian’s *Broadway Boogie Woogie*, a modern sculpture like Alexander Calder’s *Flamingo*, or a temporary artistic structure like Christo and Jeanne-Claude’s *Running Fence*.

*Id.* at 20–21. If an artist, such as Mondrian, painted a still life of one of Mr. Phillips’s cakes, it would be protected artistic expression. If a sculptor, such as Calder, sculpted one of Mr. Phillips’s cakes out of clay, it would be protected artistic expression. Surely, the original cake painted and sculpted by Phillips is also protected artistic expression.

<sup>57</sup> *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 276 (Colo. App. 2015) (emphasis added), *rev’d*, 138 S. Ct. 1719 (2018).

<sup>58</sup> *Masterpiece Cakeshop*, 138 S. Ct. at 1724.

our understanding of their meaning.”<sup>59</sup> Moreover, if a baker refuses “to design a special cake with words or images celebrating the marriage,” these additional details “might make a difference.”<sup>60</sup> This free speech dicta in the case leaves behind some very helpful buried bones to be dug up and applied in a subsequent case involving cake artists or other expressive wedding vendors.

Though the majority in *Masterpiece Cakeshop* did not reach the compelled speech issue in the case, a number of the concurring opinions did reach the issue. For example, Justice Thomas had a great deal to say about the issue in his concurring opinion joined by Justice Gorsuch. Justice Thomas argued that “[a]lthough the cake is eventually eaten, that is not its primary purpose. . . . The cake’s purpose is to mark the beginning of a new marriage and to celebrate the couple.”<sup>61</sup> Thus, compelling Phillips to create a custom cake celebrating a same-sex wedding “clearly communicates a message—certainly more so than nude dancing.”<sup>62</sup> Even in the case of a custom cake without words or symbolic designs, when Colorado compelled Phillips to make “custom wedding cakes for same-sex marriages,” it forced him “at the very least, [to] acknowledge that same-sex weddings are ‘weddings’ and [to] suggest that they should be celebrated—the precise message he believes his faith forbids.”<sup>63</sup> Justice Thomas concluded that “[t]he First Amendment prohibits Colorado from requiring Phillips to ‘bear witness to [these] facts,’ or to ‘affir[m] . . . a belief with which [he] disagrees.’”<sup>64</sup>

Justice Kagan took issue with Justice Thomas in her concurring opinion joined by Justice Breyer. Kagan argued that Phillips’s refusal to bake the cake for the same-sex couple should not be viewed as refusing to bake a cake celebrating same-sex marriage, but rather as refusing to supply a product—a cake that is “simply a wedding cake” —and therefore “one that (like other standard wedding cakes) is suitable for use at same-sex and opposite-sex weddings alike.”<sup>65</sup> Like a table, chair or napkin, a

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<sup>59</sup> *Id.* at 1723.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 1743 (Thomas, J., concurring).

<sup>62</sup> *Id.* (citing *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565–66 (1991)).

<sup>63</sup> *Id.* at 1744.

<sup>64</sup> *Id.* (quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Bos., Inc.*, 515 U.S. 557, 573–74 (1995)).

<sup>65</sup> *Id.* at 1733 n.\* (Kagan, J., concurring).

wedding cake is merely a utilitarian product, not an expressive celebration of any particular class of marriage.<sup>66</sup>

But Justice Gorsuch was having none of this. In his concurring opinion, joined by Justice Alito, he argued that it is “irrational” to conclude “that cakes with words convey a message but cakes without words do not.”<sup>67</sup> Indeed, no one can “reasonably doubt that a wedding cake without words conveys a message.”<sup>68</sup> Without regard to the presence of words or “whatever the exact design,” a wedding cake “celebrates a wedding, and if the wedding cake is made for a same-sex couple it celebrates a same-sex wedding.”<sup>69</sup> The context of the custom wedding cake determines the message expressed by the cake artistry.

A perfect example of how context matters in determining the message of a custom design can be found in *Scardina v. Masterpiece Cakeshop, Inc.* (“*Masterpiece 2.0*”).<sup>70</sup> Decided only days after the Supreme Court issued its opinion protecting Mr. Phillips’s religious liberty in *Masterpiece Cakeshop*, the Complainant in *Masterpiece 2.0*, Autumn Scardina, requested a custom birthday cake with a pink interior and a blue exterior.<sup>71</sup> The Complainant “explained that the design was a reflection of the fact that [she] transitioned from male-to-female,” that she “had come out as transgender on [her] birthday,” and “that the cake was ‘to celebrate a sex-change from male to female.’”<sup>72</sup> Obviously, the message Complainant asked Mr. Phillips to create through his cake artistry was much more than “happy birthday.” Rather, he was asked to design a cake expressing a celebration of male-to-female gender transition, something his deeply held religious beliefs would not allow him to do.<sup>73</sup> Context matters in speech, and the context here alters the message from a celebration of a birthday to a celebration of a sex change.<sup>74</sup>

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 1738 (Gorsuch, J., concurring).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Scardina v. Masterpiece Cakeshop Inc.*, Charge No. CP2018011310 (Colo. Civil Rights Comm’n June 28, 2018).

<sup>71</sup> *Id.* at 2.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 3.

<sup>74</sup> The Colorado Civil Rights Division ruled against Phillips and found that he violated Complainant’s right to “equal enjoyment of a place of public accommodation” by declining to create a custom cake celebrating her gender transition. *Id.* at 4. Masterpiece Cakeshop and Mr. Phillips responded to this ongoing threat to their religious liberty and freedom of speech by filing a federal

As in the case of a “birthday cake” expressing a message of celebration for a male-to-female gender transition, so also in the case of a “wedding cake” celebrating a same-sex marriage. The context in each case makes clear what is the message expressed by the custom cake. And when government compels a cake artist to create cakes expressing messages such as these contrary to his conscience, it violates the Free Speech Clause and the “no compelled speech” doctrine that resides at the core of freedom of speech.

The Commission’s order in *Masterpiece Cakeshop* creates a classic unconstitutional condition.<sup>75</sup> Colorado requires Phillips to choose between two constitutional rights: his right to create art he wishes to create, and his right to refrain from creating art he wishes not to create. He can have one constitutional right or the other, but not both. Indeed, in order to comply with the order in this case, Phillips has stopped creating wedding cakes for anyone.<sup>76</sup> His artistic expression has been chilled—indeed, it has been frozen in its tracks—by order of the state of Colorado. The First Amendment does not permit government to put an artist to that odious choice.

Although *Masterpiece Cakeshop* did not decide Phillips’s compelled speech claim, the Supreme Court did issue a strong opinion on the right of individuals not to be compelled “to speak a particular message” only a few weeks later in *National Institute of Family and Life Advocates v. Becerra*.<sup>77</sup> In *Becerra*, the state of California required pro-life crisis pregnancy centers to provide certain “government-drafted” notices to their clients and in their advertisements.<sup>78</sup> Remarkably, in his concurring opinion in *Becerra*, in which Chief Justice Roberts and Justice Gorsuch joined, Justice Kennedy authored a powerful and eloquent manifesto against California’s attempt to “compel[] individuals to contradict their

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civil rights action against the Colorado Civil Rights Commission and its Director, Aubrey Elenis, in the United States District Court for the District of Colorado. Complaint, *Masterpiece Cakeshop Inc. v. Elenis*, No. 1:18-cv-02074-WYD-STV (D. Colo. Jan. 4, 2019).

<sup>75</sup> See *Unconstitutional–Conditions Doctrine*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“[T]he government cannot force . . . [a person] to choose between two constitutionally protected rights.”).

<sup>76</sup> See Petitioner’s Brief, *supra* note 8, at 28 (“[T]he Commission’s order has forced him to shut down his wedding business completely, slashing his income by 40%, forcing the loss of most of his staff, and silencing his artistic voice on marriage.”).

<sup>77</sup> *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018).

<sup>78</sup> *Id.*

most deeply held beliefs, beliefs grounded in basic philosophical, ethical, or religious precepts.”<sup>79</sup> Justice Kennedy expressed great concern that the compelled speech in *Becerra* amounted to viewpoint discrimination and described the danger as follows:

This law is a paradigmatic example of the serious threat presented when government seeks to impose its own message in the place of individual speech, thought, and expression. For here the State requires primarily pro-life pregnancy centers to promote the State’s own preferred message advertising abortions. This compels individuals to contradict their most deeply held beliefs, beliefs grounded in basic philosophical, ethical, or religious precepts, or all of these.<sup>80</sup>

But what is even more noteworthy is Justice Kennedy’s response to the self-congratulatory statement by the California Legislature that “the Act was part of California’s legacy of ‘forward thinking.’”<sup>81</sup> Justice Kennedy observed that it is not “forward thinking” to compel ideological uniformity and continued:

It is forward thinking to begin by reading the First Amendment as ratified in 1791; to understand the history of authoritarian government as the Founders then knew it; to confirm that history since then shows how relentless authoritarian regimes are in their attempts to stifle free speech; and to carry those lessons onward as we seek to preserve and teach the necessity of freedom of speech for the generations to come. Governments must not be allowed to force persons to express a message contrary to their deepest convictions. Freedom of speech secures

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<sup>79</sup> *Id.* at 2379 (Kennedy, J., concurring).

<sup>80</sup> *Id.* When government compels speech—whether it be pledging allegiance to the flag, expressing an ideological message such as “live free or die,” recognizing Irish–American gay pride, advertising the availability of subsidized abortion services, or creating a wedding cake celebrating same-sex marriage—the compelled message almost always will be a viewpoint that the speaker wishes not to express. *Id.*

<sup>81</sup> *Id.*



freedom of thought and belief. This law imperils those liberties.<sup>82</sup>

What Justice Kennedy said so forcefully in *Becerra* could have been said just as powerfully in *Masterpiece Cakeshop*. Governments are indeed forbidden by the First Amendment from forcing individuals to say that which they “do not think.”<sup>83</sup> And the decision in *Becerra* makes clear that the Court is committed to the “no compelled speech” doctrine of the First Amendment as a fundamental protection of speakers and artists from authoritarian government.

### III. THE FREE EXERCISE RULING IN *MASTERPIECE CAKESHOP*

In *Employment Division, Department of Human Resources of Oregon v. Smith*,<sup>84</sup> a still-controversial decision from late in the twentieth century, the Supreme Court held that “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”<sup>85</sup> Thus, the general rule of free exercise under *Smith* is “that government may prohibit what religion requires or require what religion prohibits.”<sup>86</sup> However, the principal exception to that general rule, as the Court itself emphasized in *Church of the Lukumi Babalu Aye v. City of Hialeah*,<sup>87</sup> is this:

A law burdening religious practice that is not neutral or not of general application must undergo the most

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<sup>82</sup> *Id.* See also *Janus v. Am. Fed’n of State, County & Mun. Emps.*, 138 S. Ct. 2448 (2018) (striking down laws that require dissenting workers to subsidize unions). In *Janus*, the Court once again used powerful language describing the evil of speech compelled by government. Speaking for the majority, Justice Alito observed that compelled speech is even more damaging than speech restrictions, because “[w]hen speech is compelled” by government “individuals are coerced into betraying their convictions;” thus, “[f]orcing free and independent individuals to endorse ideas they find objectionable is always demeaning.” *Id.* at 2464.

<sup>83</sup> Solzhenitsyn, *supra* note 28.

<sup>84</sup> 494 U.S. 872 (1990).

<sup>85</sup> *Id.* at 879.

<sup>86</sup> Richard F. Duncan, *Free Exercise is Dead, Long Live Free Exercise: Smith, Lukumi and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 850 (2001).

<sup>87</sup> 508 U.S. 520 (1993).

rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance “interests of the highest order” and must be narrowly tailored in pursuit of those interests.<sup>88</sup>

The free exercise issue before the Court in *Masterpiece Cakeshop*, then, was whether the general rule of *Smith* or the important exception set forth in *Lukumi* applied to the facts of Phillips’s religiously-motivated refusal to create a custom wedding cake celebrating a same-sex wedding.

In *Masterpiece Cakeshop*, the Court, in a strongly-worded but weakly-reasoned opinion, concluded that the Colorado Civil Rights Commission did not act with “the religious neutrality that the Constitution requires”<sup>89</sup> when applying the public accommodations law against Phillips, and that therefore its order requiring him to bake custom cakes for same-sex weddings “violated the Free Exercise Clause” and “must be set aside.”<sup>90</sup> Although the Court made clear that as “a general rule” religious objections “of business owners and other actors in the economy and in society” are not protected “under a neutral and generally applicable public accommodations law,”<sup>91</sup> there are exceptional cases in which the Free Exercise Clause will protect religious objectors. For example, although the issue was not before the Court in *Masterpiece Cakeshop*, the majority observed in dictum that “a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion.”<sup>92</sup> Apparently this is a categorical rule and would govern even if the law being enforced was neutral and generally applicable. Although the Court did not say so, an exception for the clergy is probably required by the so-called “ministerial exception” as announced by the Supreme Court in *Hosanna–Tabor Evangelical Lutheran Church and School v. EEOC*.<sup>93</sup> But by stating it as a categorical rule (even if in dictum) in

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<sup>88</sup> *Id.* at 546 (citations omitted).

<sup>89</sup> *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1724 (2018).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 1727.

<sup>92</sup> *Id.*

<sup>93</sup> *Hosanna–Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012) (stating the ministerial exception is designed to forbid

*Masterpiece Cakeshop*, the Court has brought much-needed clarity to at least one question about the intersection of gay rights laws and religious liberty.

Although Phillips is not a member of the clergy, there was no question that the Commission's order required him to act contrary to his sincerely held religious beliefs. As Justice Kennedy explained, "[t]o Phillips, creating a wedding cake for a same-sex wedding would be equivalent to participating in a celebration that is contrary to his own most deeply held beliefs."<sup>94</sup> However, since the public accommodations law is facially neutral and generally applicable, Phillips's free exercise claim would prevail only if the law was applied against him in a manner that contravened "the religious neutrality that the Constitution requires."<sup>95</sup> Based upon the facts of this particular case, the Court held that Colorado violated the requirement of neutrality for two reasons.

First, in the course of the Commission's investigation of the charge of discrimination lodged against Phillips, certain commissioners made statements on the record that the Court interpreted as disparaging Phillips's religious beliefs. For example, during the July 25, 2014, meeting of the Commission, one commissioner disparaged freedom of religion as justifying "all kinds of discrimination throughout history" including "slavery" and "the holocaust."<sup>96</sup> This commissioner went on to say that when religious freedom is employed "to justify discrimination" or "to hurt others," it constitutes "one of the most despicable pieces of rhetoric that people can use."<sup>97</sup> Justice Kennedy was deeply offended by these expressions of anti-religious bigotry "by an adjudicatory body deciding a particular case,"<sup>98</sup> and concluded that "[t]his sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's antidiscrimination law."<sup>99</sup>

Second, and most important, the Commission applied a double standard when investigating discrimination complaints

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government action that "interferes with the internal governance of the church . . . [and] its beliefs").

<sup>94</sup> *Masterpiece Cakeshop*, 138 S. Ct. at 1724.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 1729 (citation omitted).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 1730.

<sup>99</sup> *Id.* at 1729.

against bakers who refused to create cakes that expressed messages of which they disapproved. Although the Colorado public accommodations law prohibits discrimination on the basis of religious “creed” as well as “sexual orientation,”<sup>100</sup> the Commission applied a more lenient standard to claims of religious discrimination than to claims of sexual orientation discrimination. On at least three different occasions, cake artists refused to bake cakes with religious “images that conveyed disapproval of same-sex marriage.”<sup>101</sup> Under the public accommodations law, the state of Colorado conceded that “[b]usinesses are entitled to reject orders for any number of reasons, including because they deem a particular product requested by a customer to be ‘offensive.’”<sup>102</sup> The Commission applied this “offensive product” exception subjectively and on an ad hoc basis, apparently granting an exception when it agreed with the cake vendor and refusing an exception when it disagreed with the vendor.<sup>103</sup> Thus, the Commission repeatedly allowed cake artists to refuse to create “offensive” cakes, even though the customer was in a protected class—religious “creed”—under the public accommodations law.<sup>104</sup>

The three cases involving complaints of discrimination on the basis of religious “creed” involved the same customer, William Jack, who asked three different cake shops to bake cakes expressing his religious beliefs about same-sex marriage. Jack asked the three cake shops to create custom cakes in the shape of an open Bible with an image depicting two groomsmen covered by a red “x” and with Bible verses expressing disapproval of same-sex marriage.<sup>105</sup> Although William Jack was clearly a member of a protected class

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<sup>100</sup> Colo. Rev. Stat. § 24-34-601(2)(a) (2017).

<sup>101</sup> *Masterpiece Cakeshop*, 138 S. Ct. at 1730. In a civil rights lawsuit filed by Masterpiece Cakeshop and Mr. Phillips against Colorado officials on August 14, 2018, the Verified Complaint alleges that this “double standard . . . harshly punishes Phillips while exonerating other cake artists who similarly decline requests for cakes with messages they deem objectionable.” Complaint at 3, *Masterpiece Cakeshop Inc. v. Elenis*, No. 1:18-cv-02074-WYD-STV (D. Colo. Jan. 4, 2019).

<sup>102</sup> Brief for Respondent at 52, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111).

<sup>103</sup> See *Masterpiece Cakeshop*, 138 S. Ct. at 1730–31 (suggesting that these decisions were improperly based on “the government’s own assessment of offensiveness”).

<sup>104</sup> *Id.* at 1728–30.

<sup>105</sup> *Jack v. Gateaux, Ltd.*, Charge No. P20140071X (Colo. Civil Rights Comm’n Mar. 24, 2015); *Jack v. Le Bakery Sensual, Inc.*, Charge No. P20140070X (Colo. Civil Rights Comm’n Mar. 24, 2015); *Jack v. Azucar Bakery*, Charge No. P20140069X (Colo. Civil Rights Comm’n Mar. 24, 2015).

based upon his religious creed, the Colorado Civil Rights Division determined that the refusal to create cakes was not based upon that protected status, but rather because the cake artists deemed the requested words and images to be “discriminatory,”<sup>106</sup> “hateful,”<sup>107</sup> or “derogatory.”<sup>108</sup> However, when Phillips made exactly the same argument—that he was willing to sell any other baked goods to gay customers and that his refusal to bake wedding cakes for same-sex weddings was not based upon the sexual identity of his customers but rather his religious beliefs about the definition of marriage—Colorado ruled against him. As Justice Kennedy put it, “[i]n short, the Commission’s consideration of Phillips’s religious objection did not accord with its treatment of these other objections.”<sup>109</sup> Thus, this unequal treatment of Phillips “violated the State’s duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint.”<sup>110</sup> The Free Exercise Clause requires neutral and generally applicable laws and treatment, and “bars even ‘subtle departures from neutrality’ on matters of religion.”<sup>111</sup> The Court concluded that Colorado’s “disparate consideration of Phillips’s case compared to the cases of the other bakers” violated the Free Exercise Clause, and thus the cease and desist order issued against Phillips “must be set aside.”<sup>112</sup>

Although the Court’s “neutrality” analysis in *Masterpiece Cakeshop* was seriously under-reasoned, it is nevertheless an important contribution to religious liberty jurisprudence because it clearly recognizes that “[e]xemptions for secular interests without exemptions for religious practice reflect a hostile indifference to religion.”<sup>113</sup> Moreover, the Court’s laser-beam focus on Colorado’s ad hoc process for making subjective evaluations of the “offensiveness” of a cake’s message as a legitimate reason for a vendor’s refusal to create a cake for a member of a protected class<sup>114</sup> appears to be an important application of a rule, recognized in both *Smith* and *Lukumi*: If the state has in place a system for “individualized governmental assessment of the reasons for the

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<sup>106</sup> *Azucar Bakery*, Charge No. P20140069X.

<sup>107</sup> *Le Bakery Sensual*, Charge No. P20140070X.

<sup>108</sup> *Gateaux*, Charge No. P20140071X.

<sup>109</sup> *Masterpiece Cakeshop*, 138 S. Ct. at 1730.

<sup>110</sup> *Id.* at 1731.

<sup>111</sup> *Id.* (citation omitted).

<sup>112</sup> *Id.* at 1732.

<sup>113</sup> Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 50.

<sup>114</sup> See *supra* notes 100–04 and accompanying text.

relevant conduct,”<sup>115</sup> and if the government grants individualized exemptions “from its law for secular reasons, then it must grant comparable exemptions for religious reasons.”<sup>116</sup>

Religious liberty is particularly vulnerable under such a subjective ad hoc process because individualized decision-making by government “provides ample opportunity for discrimination against religion in general or unpopular faiths in particular.”<sup>117</sup> The risk is great that government officials will not “apply[] a consistent legal rule” when exercising such unfettered discretion.<sup>118</sup> Thus, as Justice Gorsuch explained,

the Commission’s decisions simply reduce to this: it *presumed* that Mr. Phillip[s] harbored an intent to discriminate against a protected class in light of the foreseeable effects of his conduct, but it declined to presume the same intent in Mr. Jack’s case even though the effects of the bakers’ conduct were just as foreseeable.<sup>119</sup>

In other words, in applying its ad hoc process for making subjective evaluations of the “offensiveness” of a cake’s message as a legitimate reason for a vendor’s refusal to create a cake for a member of a protected class, the Commission was guilty of applying “a more generous legal test to secular objections than religious ones.”<sup>120</sup> Under the Free Exercise Clause, this failure of neutral treatment requires the officials to justify their double standard under strict scrutiny and the compelling interest test.<sup>121</sup> Moreover, and once again in the words of Justice Gorsuch,

[b]ut it is also true that no bureaucratic judgment condemning a sincerely held religious belief as “irrational” or “offensive” will ever survive strict scrutiny under the First Amendment. In this country, the place of secular officials isn’t to sit in judgment

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<sup>115</sup> Emp’t Div., Dep’t of Human Res. of Or. v. Smith, 494 U.S. 872, 884 (1990).

<sup>116</sup> See Laycock, *supra* note 113.

<sup>117</sup> *Id.* at 48.

<sup>118</sup> Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n, 138 S. Ct. 1719, 1736 (2018) (Gorsuch, J., concurring).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 1737.

<sup>121</sup> Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 537 (1993) (stating that the compelling interest test applies when government applies an individualized exemption process but refuses to recognize religious claims for exemption). See Richard F. Duncan, *Free Exercise and Individualized Exemptions: Herein of Smith, Sherbert, Hogwarts, and Religious Liberty*, 83 NEB. L. REV. 1178, 1187 (2005).

of religious beliefs, but only to protect their free exercise.<sup>122</sup>

Going forward, free exercise claims by wedding vendors should focus carefully on subjective tests employed by civil rights commissions when determining whether a vendor has engaged in unlawful discrimination or has lawfully declined to supply an “offensive” product or a cake with an “offensive” message. The Supreme Court has repeatedly made clear that when government officials allow individualized secular exemptions from a regulatory standard, it must also extend protection to religious exemption claims. For example, in *Sherbert v. Verner*,<sup>123</sup> Sherbert’s religious liberty was unequally burdened by South Carolina’s individualized unemployment compensation process. Thus, the South Carolina law was neither neutral nor generally applicable because an applicant was ineligible for unemployment benefits only if the Employment Security Commission made an ad hoc finding that he or she had failed without “good cause” to accept “suitable work.”<sup>124</sup> Since the Commission was empowered to grant “good cause” or “suitability” exemptions to those who had refused work for certain secular reasons—such as an applicant’s physical fitness, prior earnings, and prospects for securing local work in his or her customary occupation—but refused to grant a similar exemption to Sherbert when she declined employment for religious reasons, the law was tainted by a discretionary process and, therefore, was not neutral and generally applicable.<sup>125</sup>

Similarly, in *Lukumi* the Court discussed a Florida animal cruelty law that punished anyone who killed any animal “unnecessarily.”<sup>126</sup> Although this law appeared on its face to be both neutral and generally applicable, the Court viewed it as representing “a system of ‘individualized governmental assessment of the reasons for the relevant conduct,’” because the law required government officials to decide which animal killings were “necessary” and which were “unnecessary” when enforcing the ordinance.<sup>127</sup> The Court in *Lukumi* stated that the compelling interest test applies whenever a religious-accommodation claim is denied

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<sup>122</sup> *Masterpiece Cakeshop*, 138 S. Ct. at 1737 (Gorsuch, J., concurring).

<sup>123</sup> 374 U.S. 398 (1963).

<sup>124</sup> *Id.* at 400–01.

<sup>125</sup> *See id.* at 400 n.3 (describing the process for granting “good cause” and “suitability” exemptions).

<sup>126</sup> *Lukumi*, 508 U.S. at 537.

<sup>127</sup> *Id.* (quoting *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 884 (1990)). Although government officials considered the killing of animals for religious sacrifice as unnecessary, they considered hunting and many other secular killings as necessary. *Id.*

under “circumstances in which individualized exemptions from a general requirement are available.”<sup>128</sup>

Thus, as Professor Douglas Laycock explained in an article published before *Masterpiece Cakeshop* was decided:

A Christian activist named William Jack, who is not a party to the litigation, smoked out the state of Colorado and forced it to make explicit what is usually left to speculation: the refusal to protect conscientious objectors in these cases is discriminatory and one sided. Colorado protects conscientious objectors who support gay rights or marriage equality, but it does not protect conscientious objectors who oppose marriage equality. Because the law is not applied equally, it is not neutral and generally applicable, and it is therefore subject to strict scrutiny under the Free Exercise Clause.<sup>129</sup>

The subjective process the Colorado Commission applied when deciding whether a conscientious objector has lawfully declined to create a product because of its offensive message is categorically non-neutral. The answer to the question whether it is lawful to reject a product with an offensive message “cannot depend on whether the state, or the court, agrees with the message.”<sup>130</sup> An individualized and subjective process for determining who is exempt from a regulatory burden is not a religiously-neutral process, and therefore, strict scrutiny applies under *Lukumi* when a religious conscientious objector is denied an exemption.<sup>131</sup>

#### IV. CONCLUSION

Public accommodations laws are being weaponized by supporters of same-sex marriage to drive religious conscientious objectors out of business and deprive them of their livelihoods. For example, in *Masterpiece Cakeshop*, Charlie Craig and Dave Mullins attempted to use Colorado law not only to demand “the right to live their own lives by their own values, but also the right to force religious objectors to assist them in doing so.”<sup>132</sup> The issue was not

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<sup>128</sup> *Id.* at 537. See generally Duncan, *Free Exercise and Individualized Exemptions: Herein of Smith, Sherbert, Hogwarts and Religious Liberty*, *supra* note 121, at 1178–1203.

<sup>129</sup> Douglas Laycock, *The Wedding-Vendor Cases*, 41 HARV. J.L. & PUB. POL’Y 49, 54–55 (2018) (citations omitted).

<sup>130</sup> *Id.* at 57.

<sup>131</sup> See *supra* notes 86–88 and accompanying text.

<sup>132</sup> Laycock, *supra* note 1, at 879–80.



whether they could obtain a custom wedding cake in the Denver metropolitan marketplace, but whether Jack Phillips must set aside his sincerely held religious beliefs to design a wedding cake celebrating their same-sex wedding.<sup>133</sup>

This disdain for religious liberty is not accidental; it is a mainstream opinion among progressive supporters of same-sex marriage and gay rights.<sup>134</sup> In 2013, for example, when Mr. Phillips's home state of Colorado passed a civil-union bill covering same-sex relationships without meaningful protection for religious liberty, the bill's sponsor mocked and delegitimized religious liberty as follows:

So, what to say to those who say religion requires them to discriminate. I'll tell you what I'd say. Get thee to a nunnery and live there then. Go live a monastic life away from modern society, away from people you can't see as equal to yourself, away from the stream of commerce where you may have to serve them.<sup>135</sup>

In other words, religious believers must choose between their religious beliefs and their livelihoods. If your religion is not consistent with participating in (and even celebrating) same-sex relationships, you should close down your business and “get thee to a nunnery.”<sup>136</sup>

But religious liberty is not just a trivial consideration that can be cast aside whenever it gets in the way of the policy preferences of a majority. Free speech and religious liberty are inalienable civil rights, fundamental freedoms protected explicitly by the Bill of Rights. And this is where *Masterpiece Cakeshop* takes the stage to remind us that the First Amendment still exists and continues to protect free speech and religious liberty against restrictions imposed by majoritarian laws. Jack Phillips did not fight for a right to “discriminate” against gays and lesbians; he serves all customers, including gays and lesbians. Like Solzhenitsyn, he fought for the right to refrain from saying that which he does not think, that which he does not believe reflects God's truth about what marriage is and what it is not.<sup>137</sup>

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<sup>133</sup> *Id.* at 877 (“All those things are readily available in the market place in most of the country. The issue is whether the religious conscientious objector must be the one who provides these things.”).

<sup>134</sup> *See id.* at 870.

<sup>135</sup> *Id.* at 871.

<sup>136</sup> *Id.*

<sup>137</sup> *See supra* notes 28–29 and accompanying text.

Although Justice Kennedy’s majority opinion in *Masterpiece Cakeshop* did not base its holding on the Free Speech Clause, it contains powerful dicta that may be helpful in future compelled speech cases involving wedding vendors whose services are expressive.<sup>138</sup> Moreover, in *Becerra* the Court issued a very strong opinion striking down laws requiring pro-life crisis pregnancy centers “to speak a particular message.”<sup>139</sup> And Justice Kennedy wrote a powerful concurring opinion in *Becerra* denouncing attempts by “authoritarian government” to compel speech and ideological uniformity.<sup>140</sup> Indeed, 2018 was a historic year for the Free Speech Clause and the “no compelled speech” doctrine. The next cake artistry case to reach the Court will have a much easier path to protection under the Free Speech Clause because of the decisions in *Masterpiece Cakeshop*, *Becerra*, and *Janus*.<sup>141</sup>

The Court did rule in favor of Mr. Phillips’s free exercise claim in *Masterpiece Cakeshop*, and, although Justice Kennedy’s majority opinion was somewhat under-reasoned, it nevertheless paves a significant path for religious liberty claims going forward. The Court held that Colorado’s enforcement of its public accommodations law against Phillips contravened “the religious neutrality that the Constitution requires”<sup>142</sup> for two reasons. First, neutrality was compromised because the Colorado Civil Rights Commission made a number of bigoted statements disparaging Phillips’s religious beliefs in particular and religious freedom in general.<sup>143</sup>

Second, and most important for future free exercise cases, the Court held that the requirement of neutrality was not satisfied because the Commission applied a double standard when investigating discrimination complaints.<sup>144</sup> This was so because the Commission applied a more generous standard to secular bakers who objected to a cake’s message than to religious bakers asserting conscientious objections. Because this process for evaluating the “offensive product” exemption from Colorado’s public accommodations law was an individualized and subjective one,

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<sup>138</sup> See *supra* notes 58–60 and accompanying text. Moreover, Justice Thomas and Justice Gorsuch authored thoughtful and powerful concurring opinions in support of Phillips’s free speech rights. See *supra* notes 61–69 and accompanying text.

<sup>139</sup> See *supra* notes 77–78 and accompanying text.

<sup>140</sup> See *supra* notes 79–83 and accompanying text.

<sup>141</sup> See *supra* text accompanying note 82 (providing a brief discussion of *Janus*).

<sup>142</sup> *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1724 (2018).

<sup>143</sup> See *supra* text accompanying notes 96–99.

<sup>144</sup> See *supra* notes 113–16 and accompanying text.

strict scrutiny applies when equal exemptions are not extended to religious conscientious objectors. In short, an individualized and subjective process for determining who is exempt from a regulatory burden is not a religiously-neutral process, and therefore triggers strict scrutiny under *Lukumi* when a religious conscientious objector is denied an exemption.<sup>145</sup> In future cases involving religious wedding-vendors charged with violating public accommodations laws, counsel would be wise to look long and hard at the argument that an individualized exemption is likely to fail the test of neutrality under the Free Exercise Clause.

In conclusion, pragmatists may ask why does a man like Jack Phillips insist on his right not to create a custom cake celebrating a same-sex wedding? Why not just give in and bake the cake rather than put your business and livelihood at risk under the public accommodations law? Perhaps the answer to this question is found in Robert Bolt's wonderful play about Sir Thomas More, *A Man For All Seasons*.<sup>146</sup>

In one powerful scene from the play, More's friends are encouraging him to obey the King's command and sign a statement recognizing the lawfulness of the King's divorce and remarriage. Just give in, Thomas, just give in, they beg. And More says this: "Some men think the Earth is round, others think it is flat; it is a matter capable of question. But if it is flat, will the King's command make it round? And if it is round, will the King's command flatten it? No, I will not sign."<sup>147</sup> Like Solzhenitsyn, More's conscience required him to speak the truth—and only the truth—as he best understood it. He must refuse to say that which he does not think, that which he does not believe reflects the truth of what marriage is in the eyes of God.

Like More, Jack Phillips is a man of deep and sincere conscience. His conscience will not permit him to use his artistry to celebrate an event that is not consistent with his understanding of God's truth. He should not be treated like an outlaw by his government.

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<sup>145</sup> See *supra* note 131 and accompanying text.

<sup>146</sup> ROBERT BOLT, *A MAN FOR ALL SEASONS: A PLAY IN TWO ACTS* (Random House 1990) (1960).

<sup>147</sup> *Id.* at 133.